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Supreme Court, U.S.
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No. 90-1978

In The

Supreme Court of the United States

October Term, 1991

JOSE L. ROY,

Petitioner,

vs.

AMOCO OIL COMPANY,

Respondent.

Petition For A Writ Of Certiorari To The Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Eleventh Circuit, in affirming the district court's finding that only one alleged violation of the ADEA occurred in this case and that it took place more than 300 days prior to the filing of the plaintiff's EEOC charge, "decided an important question of federal law which has not been, but should be, settled by this Court" or "decided a federal question in a way that conflicts with applicable decisions of this Court"?

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INTRODUCTION

The petitioner, Jose Roy ("Roy"), alleged in his Complaint that he was forced to take early retirement from his employment with the respondent, Amoco Oil Company ("Amoco"), in violation of § 4(f)(2) of the Age Discrimination in Employment Act of 1967 ("ADEA"). Roy's ostensible election to take early retirement was manifested by his signing of an early retirement letter on September 24, 1986. Roy claimed that he was coerced into signing the letter. However, Roy did not file an administrative charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") until August 1, 1988, which was 675 days after his signing the letter. As a result, Amoco argued before the district court that Roy's EEOC charge was not filed within 300 days "after the alleged unlawful employment practice occurred," as required by § 7(d)(1) of the ADEA.

In order to overcome this untimeliness problem, Roy was forced to argue that a separate ADEA violation had occurred within the 300-day period preceding the filing of his EEOC charge. To that end, Roy pointed to a supplemental severance payment program which Amoco made available to him within the 300-day period.

Under the terms of the supplemental program, Roy was offered a lump sum severance payment of $71,207 in exchange for his signing a release of legal claims against Amoco. The severance payment was offered to Roy *in addition to* his regular pension, which was payable to him beginning with his retirement on January 1, 1988 *regardless* of whether he chose to participate in the severance payment program. Approximately two months before the

date of his retirement, Roy in fact did elect to participate in the severance payment program. He signed a release and eventually received a lump-sum payment of $71,207.

Roy tried to convince the district court that the supplemental severance payment program was a separate ADEA violation because he allegedly was coerced into participating in the program. The district court rejected this argument because, even if Roy's allegation about coercion were accepted as true, the severance payment program was not the "alleged unlawful employment practice" that prompted his early retirement.

Roy renewed the same argument before the Eleventh Circuit, but it was summarily rejected. Roy now seeks to raise the argument here for a third time. This Court also should reject it. Certiorari is not intended to be a vehicle for litigants simply to reargue positions that already have been rejected by the courts below. Moreover, contrary to Roy's assertions in his petition, there is nothing in the Eleventh Circuit panel's decision that "decided an important question of federal law which has not been, but should be, settled by this Court" or that "decided a federal question in a way that conflicts with applicable decisions of this Court."[1]

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[1] Arguably, the Eleventh Circuit panel did not decide *any* question of federal law in the sense contemplated by Rule 10.1(c) of the Rules of the Supreme Court of the United States. The Eleventh Circuit panel merely issued a *per curiam* affirmance of the district court's decision, without any written opinion.

STATEMENT OF THE CASE

The gravamen of Roy's Complaint under the ADEA was that he was "forced to accept involuntary retirement." [App. 20a].[2] Likewise, in the Joint Pre-Trial Stipulation, the parties agreed that Roy's lawsuit was premised on the allegation that he was "forced to retire." [App. 27a].

Following the completion of discovery, Amoco filed a summary judgment motion. The motion was based on three separate grounds, namely: (1) that Roy's EEOC charge was not filed within 300 days after his allegedly forced decision to take early retirement; (2) that Roy had signed a release of all claims against Amoco, including those arising under the ADEA; and (3) that Roy had not rescinded the release by tendering back to Amoco the $71,207 that he received in exchange for his signing of the release.

In his response to Amoco's untimeliness argument, Roy asserted two basic positions. First, Roy argued that his early retirement actually had been accomplished by means of a supplemental severance payment program in which he elected to participate (allegedly under coercion) in October, 1987, rather than by means of an early retirement letter that he signed in September, 1986. [App. 14a]. Second, Roy argued that even if the limitations period began to run in September, 1986, when he signed the early retirement letter, the violation was continuing

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[2] References in brackets are to the numbered pages of the Appendix to Roy's petition for a writ of certiorari.

because he asked Amoco within the 300-day period preceding the filing of his EEOC charge to allow him to remain in its employ. [App. 17a].[3]

The district court rejected Roy's arguments. First, based on the undisputed facts, the district court found as a matter of law that "the date for calculating the commencement of the statute of limitations period is September 24, 1986." [App. 16a]. The district court also found that Roy "filed the EEOC charge on August 1, 1988, almost two years after the date on which the court has determined the 'alleged unlawful [employment] practice occurred.' Therefore, pursuant to 29 U.S.C. § 626(d)(1), the Plaintiff's EEOC was not timely filed. Accordingly, the Plaintiff's present action is time barred." [App. 16a-17a].

With respect to Roy's second response to Amoco's untimeliness argument, the district court found that Roy's request to remain in Amoco's employ did not constitute a continuing violation that fell within the 300-day period preceding the filing of his EEOC charge. Accordingly, Roy's filing of the EEOC charge was found to be untimely. [App. 17a].

Because these rulings effectively disposed of Roy's lawsuit, the district court declined to address the other two grounds raised in Amoco's summary judgment motion. [App. 12a].

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[3] This was a different "continuing violation" argument than the one that Roy now makes in his petition for a writ of certiorari.

On appeal, the Eleventh Circuit panel issued a *per curiam* affirmance Order without any written opinion. [App. la]. The Eleventh Circuit also denied Roy's motion for rehearing and suggestion of rehearing *en banc*. [App. 2a-3a].

In his petition for a writ of certiorari, Roy continues to argue, both explicitly and implicitly, that his allegedly coerced participation in the supplemental severance payment program was a separate ADEA violation, and that it was the means by which Amoco forced him into early retirement.[4] Based on that faulty premise, which already has been rejected by both the district court and the Eleventh Circuit panel, Roy then proceeds to argue that the law has been misapplied to this presumed factual scenario.

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[4] For example, on page 3 of his petition, Roy states that he was "required to sign the [severance payment program documents] agreeing to sever his employment by way of early retirement. . . . " On page 6, Roy refers to "the incentive program through which the retirement was accomplished. . . . " On page 8, Roy states that he "ostensibly voluntarily agreed to retire by entry into an early retirement incentive program. . . . " On page 14, Roy states that "no legitimate reason existed for forcing [him] to retire in 1987." On page 15, Roy refers to "AMOCO's use of the [severance payment program] to force other individuals to retire. . . . " At best, these statements are merely repetitions of the same argument that already has been rejected by the district court and the Eleventh Circuit panel. At worse, they are disingenuous distortions of the record that are calculated to give a false impression about what the courts below decided. *Amoco asserts that each of the statements quoted above is a "misstatement of fact or law" within the meaning of Rule 15 of the Rules of the Supreme Court of the United States.*

REASONS FOR DENYING THE WRIT

1. No Conflict With Applicable Supreme Court Decisions

In the petition, at pages 10-15, Roy argues that the decisions of the district court and the Eleventh Circuit panel are "in direct contravention" of this Court's decisions in *Delaware State College v. Ricks*, 449 U.S. 250, 101 S. Ct. 498, 66 L.Ed.2d 431 (1980) and *Chardon v. Fernandez*, 454 U.S. 6, 102 S. Ct. 28, 70 L.Ed.2d 6 (1982). Amoco disagrees.

Both *Ricks* and *Chardon* held that in determining the proper accrual date for the limitations period in an employment discrimination action, it is necessary to focus "on the time of the *discriminatory act*, not the point at which the *consequences* of the act become painful." 102 S. Ct. at 29 (emphasis in original). In *Ricks* and *Chardon*, the plaintiffs' actions were held to be time-barred because, while their actual terminations of employment took place within the respective limitations periods, the plaintiffs had received notice of their employers' allegedly discriminatory conduct much earlier, at a point in time outside the limitations periods. The plaintiffs' actual terminations were held to be merely the delayed effects of the earlier discriminatory conduct.

Roy claims that the instant action is distinguishable from *Ricks* and *Chardon* because he alleged that a separate and distinct ADEA violation occurred within the limitations period. Amoco readily acknowledges that Roy made such an allegation. As explained above, however, both the district court and the Eleventh Circuit panel rejected Roy's claim. They held that there was *only one* allegedly

discriminatory act, and that it took place outside the limitations period. Thus, the holding in this action is entirely consistent with *Ricks* and *Chardon*.

Roy also argues, at pages 17-18 of the petition, that the opinions of the district court and the Eleventh Circuit panel "collide" with this Court's decision in *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 102 S. Ct. 1114, 71 L.Ed.2d 214 (1982). Again, Amoco disagrees.

In *Havens Realty*, this Court reaffirmed the basic soundness of the "continuing violation" principle. It held that a defendant in a discrimination action can be held liable for the entire course of a continuing pattern of discriminatory conduct so long as one discrete act that was a part of the pattern was carried out within the limitations period.

Roy claims that he is entitled to rely on the "continuing violation" theory because one discrete act in Amoco's alleged "company-wide policy of discrimination" – namely, his allegedly coerced participation in the supplemental severance payment program – occurred within the 300-day period preceding the filing of his EEOC charge. There are, however, two fundamental flaws in Roy's argument. First, neither of the courts below found that the severance payment program was discriminatory. Second, even if they had, there was no evidence that the severance payment program was linked to Roy's early retirement decision in the sense that it caused or motivated the decision. Indeed, the evidence before the district court was that Amoco's early retirement program and the severance payment program were conceptually and practically distinct from one another.

2. No Need To Settle Important Questions Of Federal Law

Roy also argues, at page 9 of the petition, that the courts below decided "important question[s] of federal law which [have] not been, but should be, settled by this Court." In particular, Roy argues that "the District Court and Court of Appeal have fashioned a new rule for charge-filing purposes" by holding that a separate and discrete ADEA violation which occurred within the limitations period was merely a "delayed, but inevitable, consequence" of earlier discriminatory conduct that occurred outside the limitation period; and by holding that "there may be but one [ADEA] violation only" in any one lawsuit. Amoco disagrees.

Roy's first argument is premised on the assumption that the courts below found that the severance payment program was a separate and discrete ADEA violation. However, they did not. In fact, despite Roy's persistent efforts, the courts below specifically rejected that argument. Having done so, the district court and the Eleventh Circuit panel followed well-settled precedent in finding that the only identified "unlawful employment practice" – namely, Roy's allegedly coerced signing of the early retirement letter – fell outside the 300-day limitations period.

Roy's second argument is patently frivolous. There is nothing in the district court's opinion or in the Eleventh Circuit panel's affirmance which suggests that "there may be but one violation only" in an action under the ADEA. The courts below merely held, based on the facts of *this*

particular case, that only one alleged violation occurred here. There was no generalization of that limited finding.

3. No Need To Resolve Hypothetical Issue

On pages 10-11 of the petition, Roy describes a hypothetical situation that apparently is intended to point out a fallacy of this Court's discussion in *Ricks* about why the "delayed, but inevitable, consequence" of an unlawful employment practice does not itself constitute a new violation. According to Roy, after the decisions of the courts below, "employers are now free" to coerce employees who are under age 40, and thus unprotected by the ADEA, by forcing them to agree to take early retirement at some designated future date after they have reached age 40. Then, when the time comes to force the employees to retire pursuant to their earlier agreements, the employees would have no legal recourse because the "unlawful employment practice" happened years earlier, when they were under age 40.

Aside from the far-fetched nature of his hypothetical situation, it has nothing whatever to do with the facts of the instant action. Roy was well over 40 years old, and thus was covered by the protections of the ADEA, when he signed the early retirement letter in September, 1986, allegedly under coercion. If he had filed his EEOC charge within 300 days following that act, as the law requires, this action would have been timely.

It is a well-settled principle of Supreme Court jurisprudence that the Court will not decide hypothetical issues of the sort that Roy has raised here. *Alabama State*

Federation of Labor v. McAdory, 325 U.S. 450, 65 S. Ct. 1384, 1389, 89 L.Ed. 1725 (1945); *Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268, 89 S. Ct. 518, 527, 21 L.Ed.2d. 474 (1969).

4. Irrelevance Of Older Workers' Benefit Protection Act

In the petition, at pages 7-8 and 17, Roy suggests that this action somehow involves the Older Workers' Benefit Protection Act, 29 U.S.C. § 626(f)(1), which was enacted by Congress in 1990. However, it does not.

Amoco did assert as one of the grounds for its summary judgment motion that Roy executed a release of his legal claims, including those arising under the ADEA. Neither the district court nor the Eleventh Circuit panel addressed that issue, however, because the district court's ruling on the untimeliness of Roy's EEOC charge disposed of the entire action. Therefore, the issue of whether Roy might have invoked the Older Workers' Benefit Protection Act in arguing that the release was unenforceable is irrelevant to this action.

CONCLUSION

For the reasons set forth herein, it is respectfully submitted that Roy's petition for a writ of certiorari should be denied.

Respectfully submitted,

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